of earning for 73 days at $20 per day and costs, was heard on the 22nd of June 1964 and was allowed with costs. It was then intimated that a written judgment would be given later and I now do so.

The accident happened near Bunut Bridge, Kampong Pek at the 33¼ mile Kuala Krai Road. Both lorries were proceeding towards Kuala Krai from Kota Bharu. The plaintiff's lorry was driven by his driver, P.W.4, and P.W.6 was the driver of the 2nd defendant's lorry. The plaintiff's lorry was loaded with goods and the plaintiff was seated beside its driver P.W.4. The 2nd defendant was not present when the accident took place.

According to P.W.6, when he arrived at Melor he stopped for coffee and invited 1st defendant to have coffee with him. He was giving 1st defendant a lift to Kuala Krai. 1st defendant said he would like to drive the lorry as he was also a lorry driver. He drove it towards Kuala Krai in spite of the repeated protests of P.W.6, the regular driver of the 2nd defendant's lorry.

P.W.4 in his evidence stated that as he was approaching a bridge and a bend beyond the bridge he saw the 2nd defendant's lorry from his rear view mirror. He gave the signal to slow down because of the bridge and the bend. 1st defendant who was driving the lorry ignored the signal and tried to overtake the plaintiff's lorry. While he was trying to do so he knocked against the bridge railing and got into the stream. 1st defendant stated that P.W.4 gave him the signal to overtake the plaintiff's lorry and when he was overtaking it the latter swerved to the right resulting in the collision.

In his submission, Mr. Sharma, for the appellant stated that the court had to consider three issues:

(1) whether the 1st defendant was a servant of the appellant or not,

(2) whether there was negligence on the part of the appellant and

(3) whether special damages which should be strictly proved had been proved.

With regard to the first issue, Mr. Sharma submitted that the 1st defendant was a trespasser and that the appellant, the owner of the lorry, was not liable for acts done by him. In his evidence P.W.6, when cross-examined by appellant's counsel, said "I also knew that my lorry cannot carry passengers. 2nd defendant had warned me not to carry passengers. I disobeyed my employer's instructions on that day." With respect I agree with the views expressed by the learned counsel. In *Bingham's* Motor Claims Cases, 4th Ed. at page 87* it was stated that the driver of a trade vehicle which had no provision for passengers in the ordinary sense gave a lift to a pedestrian, who sat on a sort of continuation of the driver's seat. The driver had been warned on two occasions by his employers that he must not take up passengers, and on one occasion that it would cause some difficulty about the insurance policy. Croom-Johnson J. held:

"The driver's act was in defiance and disobedience of a precise prohibition. The scope of the authority must be measured by reference to the ordinary duties of such a man. He had no authority from his employers nor had he been held out by anybody as having authority to pick up passengers, and no such authority was to be implied. The plaintiff ought to have known she had no authority to get into the van and must take the consequences of her own neglect. The case was one of a prohibition which limited the sphere of employment and not a prohibition of conduct within the sphere of employment." *Wright* v. *International Tea Co.*, (unreported).

Also see the cases of *Twine* v. *Bean's Express, Ltd.*(2) and *Conway* v. *George Wimpey & Co. Ltd.*(3)

In the circumstances, it would appear that the appellant should succeed on this issue alone and consequently it would become unnecessary for me to deal with the other two issues. I would therefore allow the appeal with costs.

Ismail Khan and Azmi JJ. concurred.

Appeal allowed.

Solicitors: *N. Sharma*; *Wan Mustapha & Co.*

* p. 85, 5th Edn. (1964).

P.N. PILLAY & CO. LTD. v. KAH MOTOR CO. LTD.

[O.C.J. (Abdul Aziz J.) October 5, 1964]

[K.L. — Civil Suit No. 735 of 1963]

Hire Purchase — Failure to pay instalment on motor car — Seizure of motor car — Necessity to terminate hiring.

Damages — Hire purchase of car — Unlawful seizure.

This was an action for damages for illegal seizure of a motor car the subject of a hire purchase agreement. The agreement provided that in default in the punctual payment of any of the hire rentals "the owners may immediately terminate the hiring and they shall thereupon without notice or demand....become entitled to the immediate possession of the vehicle and to retake and resume possession of the same". In this case it appeared that the plaintiff had not paid the first instalment and the respondent had seized the car, but they did not give any notice of termination of the hiring.

Held: under the terms of the agreement the owner cannot repossess the motor car until he has terminated the hiring and as there was no evidence that the defendant had terminated the hiring in this case before seizure, the seizure was unlawful.

Cases referred to:—

(1) *Abingdon Finance Co. Ltd.* v. *Champion* [1961] *Guardian*, November 6, 1961.

(2) *North Central Wagon and Finance Co. Ltd.* v. *Graham* [1950] 1 All E.R. 780; [1950] 2 K.B. 7, C.A.

CIVIL SUIT.

Richard Tallala for the plaintiff.

T. C. Tang for the defendant.

Cur. Adv. Vult.

Abdul Aziz J.: This is an action for damages for illegal seizure of a motor car the subject of a hire-purchase agreement.

On the 6th of August, 1963 the plaintiff bought a motor car from the defendant on hire-purchase. He paid an initial payment of $478.75 on signing the agreement and agreed to pay the balance of the purchase price of the vehicle by 29 instalments of $132.50 each commencing on 6th September, 1963.

It was admitted by the hirer that the first instalment due on 6th September, 1963, was not paid on that date but was paid on 20th September, 1963, which payment was however disputed by the defendant. It was the plaintiff's case that the cheque representing the first payment was made out by the plaintiff in the course of the company's business and was given to P.W.3 to be handed to the defendant's manager. Instead of handing personally to the manager P.W.3 in turn gave the cheque to one Kennedy to be handed to the defendant's manager. P.W.3 said he accompanied Kennedy to the defendant's office where from a distance he saw Kennedy handing the cheque to the manager. Kennedy was not called to give evidence. It appears from the bank statement that the cheque in question has never been cashed. The plaintiff has failed to satisfy me that the first payment was made, and I therefore find as a fact that the plaintiff has made default in the "punctual payment of any of the hire Rentals" as stated in clause 4 of the agreement. In that event "the owners may immediately terminate the hiring and they shall thereupon without previous notice or demand ....become entitled to the immediate possession of the vehicle and to retake and resume possession of the same and the hirer shall thereupon no longer be in possession of the vehicle with the consent of the owners." It was urged by the plaintiff's counsel that the termination of the hiring agreement was a condition precedent to the seizure of the vehicle under clause 4 and that the termination must be manifested by some unequivocal act such as a notice to the hirer. In support of this counsel quoted *Abingdon Finance Co. Ltd.* v. *Champion* (1) mentioned in *Goode* on Hire-Purchase at page 99. A note on the case reads "where the agreement states that the owner is to have the right to repossess *after* termination this implies that the act of repossession cannot itself constitute the means of termination and that there must be some prior and independent act" and "that any ambiguity in a hire-purchase agreement drawn up by a finance company must be construed in favour of the hirer".

It is clear from the terms of clause 4 that the hiring is not *ipso facto* terminated upon default. A question therefore arises as to how the hiring may be terminated. In *North Central Wagon and Finance Co. Ltd.* v. *Graham* (2) the question before the Court of Appeal was whether the plaintiffs were entitled to immediate possession especially having regard to the words "may terminate this agreement", and it was held that on a true construction of the agreement the plaintiff has a right to retake possession upon any breach without giving any notice to the hirer when a notice is not required by the agreement. But Asquith L.J. commented that "there is apparently no direct authority on the construction of the words 'may terminate the hiring'...." and that "one would have expected that there would be cases which decided whether those words implied the necessity of notice as a condition precedent to the termination of the hiring or whether a mere retaking would in itself constitute such a termination."

In my view there is no ambiguity in clause 4. The owner cannot repossess until he has terminated the hiring. There must be therefore some independent act indicating that the hiring has been terminated e.g. by the issue of notice to the hirer. There is nothing on record either in the pleading or in the evidence to show that the hiring has been terminated before seizure. I therefore hold that the seizure in this case was unlawful.

Coming to the plaintiff's claim, the plaintiff, I note, is no longer asking for the return of the car. Their claim is only for damages for unlawful seizure upon the basis of the loss of the business of the Diners' Club. Although there may be evidence that the business suffered during the relevant period it cannot be said that it was solely attributable to the seizure of the car. Other causes were also present. Having regard to the initial payment made by the plaintiff for the car and the inconvenience caused to the plaintiff through unlawful seizure I assess damage at $750 and there will accordingly be judgment for plaintiff for $750 plus interests and costs.

Judgment for the plaintiff.

Solicitors: *Richard Talalla & Co.*; *T. C. Tang & Co.*